

Subcommittee on Indian, Insular and Alaska Native Affairs

Doug LaMalfa, Chairman

Hearing Memorandum

October 23, 2017

To: All Subcommittee on Indian, Insular and Alaska Native Affairs Members

From: Majority Committee Staff, Subcommittee on Indian, Insular and Alaska Native Affairs (x6-9725)

Hearing: **Legislative hearing on H.R. 215 (Rep. Don Young),** To empower federally recognized Indian tribes to accept restricted fee tribal lands, and for other purposes.
Wednesday, October 25, 2017, at 2:00 p.m. in 1324 Longworth HOB

H.R. 215 (Rep. Don Young), “American Indian Empowerment Act of 2017”

Summary of the bill

H.R. 215 was introduced by Rep. Don Young on January 3, 2017. H.R. 215 authorizes a tribe at its discretion, to take fee title to its land out of federal trust, while maintaining its status as protected Indian land. The land will keep its immunity from civil regulation, state and local taxation, and likely state criminal jurisdiction. If H.R. 215 is enacted, tribes that elect to convert their land from “trust” to “restricted fee”¹ will be able to enact laws or ordinances that effectively preempt federal laws. H.R. 215 also maintains that federal trust responsibility will not be diminished in any way for a tribe that converts their land to restricted fee.

Invited Witnesses

Mr. John Tahsuda III

Acting Assistant Secretary—Indian Affairs
U.S. Department of the Interior
Washington, D.C.

The Honorable Russell Begaye

President
Navajo Nation
Window Rock, AZ

The Honorable J. Michael Chavarria

Governor
Santa Clara Pueblo
Española, NM

¹ This is land or interest in land whose title is held in fee by an Indian, but such land may not, as a matter of federal law, be taxed or transferred through sale, exchange, donation, or otherwise.

The Honorable Tim Ballew II
Chairman Tribal Economic Growth Alliance; and
Council member, Lummi Nation
Bellingham WA

Mr. Cris Stainbrook
President
Indian Land Tenure Foundation
Little Canada, MN

Mr. Eric Henson
Executive Vice President, Compass Lexecon; and
Research Affiliate, Harvard Project on American Indian Economic Development
Tucson, AZ

Background

Today there are 56 million acres of “Indian land,” of which 46 million belong to Indian tribes and 10 million to individual Indians. There are approximately another 44 million acres of land in Alaska that are owned in fee simple by Native Corporations under unique terms through which Congress settled all aboriginal land claims in Alaska.² For many tribes and Alaskan Natives, real property holdings are the basis for social, cultural, religious life and often, the single most important economic resource. Typically, Indian lands fall into one of three categories: trust, fee, and restricted fee.

Title to most Indian lands are held in trust by the United States through the Department of the Interior (DOI), preempting State tax and regulatory authority. Arguably, one of the first places in statute where the word “trust” appeared in the context of real property was under the General Allotment Act of 1887.³ Despite the policy failure of the Dawes Act, the trust language under that statute began to appear in the courts and subsequent federal statutes and policies. The Indian Reorganization Act⁴ was enacted in part to repudiate the allotment policy and the stop the loss of and restore Indian lands by authorizing lands be placed in trust.

Tribal land held in trust by the United States has distinct advantages for tribes, mainly keeping the land free from taxation and alienation under the Non-intercourse Act,⁵ as well as maintaining that the lands themselves are subject to Indian jurisdiction. However, trust status has disadvantages, such as requiring approval of the Secretary of the Interior (Secretary) on virtually every activity that occurs on trust lands. Additionally, due to government budget constraints, trust lands are not managed at the same level an Indian tribe may desire.

Many tribes have also purchased land from non-Indians, thus acquiring fee simple title to land, managing it as private property. Typically, tribes will apply to have lands placed into trust following a process located in regulations promulgated by the Secretary found in 25 C.F.R. Part

² Alaska Native Claims Settlement Act of 1971, 43 U.S.C. §1617 et seq.

³ 25 U.S.C. §348.

⁴ 25 U.S.C. §5129.

⁵ 25 U.S.C. §177.

151. As noted above, Alaska Native Corporations (ANCs) hold land in fee simple and thus they may sell, develop, encumber, or mortgage these private lands, except that such lands may not be taxed until they are developed.

Restricted Fee land

While the Indian Reorganization Act established a process for the land in trust for tribes, some tribal nations had separate statutes, settlements, treaty, or unique circumstances which provided a separate category of land protections. While the General Allotment Act impacted many tribes where reservations have been established by the Federal government through statute or executive order, section 8 of that Act provided exemptions for several tribes within Oklahoma, the Seneca Nation, and Nebraska. Some tribes own lands in restricted fee status. Title to restricted fee simple land remains with the tribe, subject to a restriction against taxation and alienation imposed by law under the Non-intercourse Act.⁶ Additionally, some tribes (Pueblos) were granted lands by previous governments and territories which were acquired by the United States, and the terms of those grants in which tribes own land in restricted fee, have been honored and not subjected to the Allotment policy.

Need for Legislation

Tribal land held in trust is effectively treated as federally-owned. It cannot be mortgaged, encumbered, transferred, leased without authorization from DOI. The results of federal management of Indian lands are stark: many reservations suffer pervasive and seemingly irreversible poverty and unemployment and lack of economic development. Each lease of a tribe's trust land must undergo a review and approval by the Secretary of the Interior under applicable federal law, including (but not limited to) the National Environmental Policy Act⁷ often delaying or impeding development.

These stark statistics are a reality because the federal "trust responsibility" has ill-served Native people, for two basic reasons. First, because the taxpayer may be liable for any federal mismanagement, DOI routinely minimizes risk and financial exposure in the actions it takes with respect to Indian lands. Minimizing risk often strongly impacts the size of the financial reward for the affected tribe.

Second, because Congress does not always expressly define the United States' "trust responsibility" in laws it enacts for Indians, DOI is not held to any specific standard that would benefit Indians when managing tribal lands. There is a common misconception that the federal "trust" for Indians is the same as a common law trust. In fact, it is a trust arising from treaty and statute, where common law principles only apply when Congress says so or when needed to fill in gaps created through ambiguous statutory language.

For years tribes have promoted changes in federal policy to increase tribal self-governance. In 2012, Congress responded by passing the HEARTH Act,⁸ which amended the Long-Term Leasing Act, giving tribes greater control over surface leasing of trust lands. It

⁶ *Id.*

⁷ 42 U.S.C. §4331 et seq.

⁸ Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012, 126 Stat. 1150.

extends the ability for every Indian tribe to lease restricted lands for business, agricultural, public, religious, educational, recreational, or residential purposes, without the prior approval of the Secretary of the Interior (this was previously only applicable to the Navajo Nation).

H.R. 215 would allow a tribe, if it so chooses, to convert land into restricted fee title to its land to be solely responsible for managing it, and not subject to many applicable federal laws governing trust lands. Thus, a tribe may develop, or use its land for any purpose without the review and approval of the government, and take whatever risk it deems necessary to benefit its members. Restricted fee status allows tribes to take full advantage of their land in ways that simply cannot be achieved if the land is fully in trust, including the ability to grant an easement or right-of-way on restricted fee tribal land without review and approval by the Secretary of the Interior.

H.R. 215 would empower tribal governments to lease and regulate their own lands and eliminate federal government restrictions that interfere with tribal economic development. It would not change any existing federal law relating to gaming development. But it would be an important step towards streamlining tribal land use for economic development beyond the HEARTH Act and thereby strengthen tribal sovereignty.

Section-by-Section Analysis

Section 1. Provides the short title.

Section 2. Subsection (a). Would require the Secretary of the Interior, at the request of an Indian tribe, to transfer to the Indian tribe in restricted fee status the title to land the United States currently holds in trust for the benefit of the Indian tribe. The subsection requires this mandatory conveyance to occur within 180 days of receipt of the written request from the Indian tribe's governing body. The lands so conveyed would continue to be subject to a federal restriction against alienation and taxation.

Subsection (b). Clarifies and confirms that all restricted fee lands are and remain "Indian country" for purposes of 18 U.S.C. § 1152 and remain subject to the restrictions on alienation and taxation set forth in 25 U.S.C. § 177. This subsection ensures that restricted fee land does not lose its status as "Indian country" nor its protections against alienation and taxation.

Subsection (c). Confirms that an Indian tribe's right to lease or grant easements or rights of way across its lands for any duration of time without review or approval by the Secretary of the Interior, notwithstanding the provisions of 25 U.S.C. § 415 to the contrary. Section 415 is the basis for the general requirement that leases of tribal land are subject to federal approval and includes limitations on use and duration.

Subsection (d) Clarifies that a tribal system of land tenure governing the use of tribal restricted fee lands preempts Federal laws governing the use of such lands. In order to have such preemptive effect, this provision requires the Secretary to publish the tribal law in the Federal Register within 120 days of having received it from the Indian tribe.

Subsection (e). Clarifies that the federal trust responsibility to Indian tribes is not diminished by the Act.

Cost

Unknown.

Administration Position

Unknown.